85-381

Supreme Court, U.S.
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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

RAMAN P. PATEL,

Petitioner,

vs.

FLYING TIGER LINE, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In exercising its discretion on a motion to dismiss as a discovery sanction, must a trial court demonstrate consideration of a party's ability to comply and whether the asserted default has prejudiced the complaining party?

PARTIES TO THE PROCEEDING

Raman P. Patel - Petitioner

The Flying Tiger Line, Inc.

- Respondent

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported. It is reproduced in the Appendix, p. A-2 et seq.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered May 13, 1985. A petition for rehearing filed by the Petitioner was denied by the Court of Appeals by order of June 11, 1985, which is reproduced in the Appendix, p. A-1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

PROVISIONS OF APPLICABLE RULE

Rule 37(d), Federal Rules of Civil Procedure, provides that the Court may impose sanctions, including dismissal,

upon a party's failure to timely respond to discovery.

Petitioner, Mr. Patel, filed suit against the Respondent, Flying Tiger, for employment discrimination after being discharged as a pilot.

During the course of his lawsuit, he was employed by another airline and spent considerable time away from his residence on flying assignments throughout the world. His assignments were irregular and imposed upon short notice.

The lawsuit was filed in Los Angeles. Mr. Patel resided in the State of Washington. His counsel resides and maintains his office in Houston, Texas.

During the course of Mr. Patel's deposition, he was required to report for flight assignment on short notice and the deposition was continued by agreement. Because of other assignments, it was

difficult to reschedule the deposition, and on December 15, 1982, Flying Tiger moved to dismiss. It was only after the motion to dismiss was filed that Mr. Patel was located through another pilot while on a stopover in Paris.

The trial court, at a hearing on the motion to dismiss, refused to consider the special circumstances stating that Mr. Patel had filed the lawsuit and it was his responsibility to comply with discovery. The judge stated that although he was inclined to dismiss the action, he would not do so at that time, but that if there were any other deviation from procedures "out the case goes."

Thereafter, Flying Tiger completed the deposition and filed interrogatories seeking the identity of witnesses and exhibits for trial.

Mr. Patel's counsel provided the information, but advised counsel for Flying Tiger that Mr. Patel could not file formal signed responses to the interrogatories until he returned from a flying assignment.

Flying Tiger, aware that Mr. Patel's counsel was on vacation, then filed a second motion to dismiss.

Plaintiff's counsel was precluded from appearing in Los Angeles for the hearing because of hurricane Alicia, which interrupted an ongoing trial in Houston, damaged counsel's office and residence, and precluded telephone contact with court personnel to seek postponement.

Shortly before the hearing, Mr. Patel's counsel was able to reach Flying Tiger's counsel, and Flying Tiger's counsel made the court aware of the

problem and a request for continuance.

The Court denied continuance and dismissed the case.

REASONS FOR GRANTING THE WRIT

As an active civil rights practitioner, the undersigned is well aware that United States district courts are faced with burgeoning calendars and virtually impossible time demands. With extreme concern, the undersigned has noted the willingness to dismiss lawsuits without due regard for the circumstances or the onerous consequences on affected parties.

The press of cases may cause a clerk to fail to give notice of a docket call, but if counsel does not appear, the case is dismissed without inquiry.

Courts rely on bromides rather than analysis. If a Plaintiff cannot timely comply with some procedural requirement,

then his case can be summarily disposed of. After all, states the Court, the Plaintiff brought the lawsuit. The lawsuit is the Plaintiff's responsibility.

The United States Supreme Court itself is overwhelmed with an increasing case load. It is not suggested by this petition that this Court should assume a supervisory role over the exercise by judges in the district courts of the broad discretion necessary to control trial court calendars.

As the ultimate depository of this nation's notions of fairness and justice, however, this Court must periodically consider the problems that court administration imposes not only upon the courts, but upon the litigants.

Where, as here, there is a clear abuse, a declaration by this Court of specific standards is essential to

prevent injustice.

More than 75 years ago, this Court, in Hammond Packing Company vs. Arkansas, 212 U.S. 322, 347, 53 L. Ed. 530 (1909), declared that dismissal in the face of "any reasonable showing of an inability to comply" constitutes an abuse of discretion.

Here, the showing is even greater.

Challenging the loss of his job as the result of racial discrimination, Mr. Patel was required to accept employment requiring flights throughout the world upon short notice and an irregular schedule.

Despite the problem and the necessity to make repeated trips from Seattle to Los Angeles to complete a deposition extending for numerous hours, Mr. Patel fully complied with all discovery requests.

Even though the pretrial procedure includes the preparation of an order listing all witnesses and exhibits, Flying Tiger filed interrogatories requesting the same information. The information was provided, but Mr. Patel was on a trip and could not formally sign a response to interrogatories.

There was a clear showing of inability to comply with the technical requirements of discovery, but there was no failure to comply with the discovery itself, nor was there any demonstrated prejudice to Flying Tiger.

This Court also has declared that such mere technical default, absent willfulness, bad faith, or other demonstrated fault, is insufficient to warrant Rule 37 dismissal. Societe Internationale vs. Rogers, 357 U.S. 197, 212, 2 L. Ed. 2d 1255 (1958).

As a crowning blow, Mr. Patel was not even able to make an argument to the trial court because of a natural disaster which certainly could not be attributed to Mr. Patel. (The Court of Appeals incorrectly characterizes Mr. Patel's contention as "that a hurricane prevented his attorney from complying with discovery and court rules," Appendix, p. A-7. Mr. Patel argued that he had a procedural due process right to argue against dismissal to the trial court.) The record clearly demonstrates that not only was Mr. Patel's counsel precluded from being present, but the hurricane, coinciding with a telephone workers' strike, made it impossible for counsel to reach court personnel to request a continuance.

This is an individual case involving one man's life and career. The issue is one, however, of more than passing

consequence. Public respect for the law and its institutions is the essence of our judicial system. That system cannot expect, nor will it receive, respect and support from all citizens if it can countenance arbitrary rejection of an individual it was simply too busy to hear.

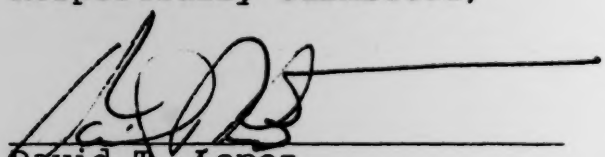
Under clearly and long-standing principles the action of dismissal cannot be allowed to stand. The action of this Court in granting certiorari and reversing, as it should, will have a salutary effect on the federal courts of the nation by providing a necessary and timely reminder on the management of a pervasive problem.

CONCLUSION AND PRAYER

Summary dismissals, motivated more by the press of time demands than by just consideration of the circumstances,

constitute a general problem which seriously affects the administration of justice. This case provides a clear-cut example. The Court should grant certiorari to provide clear and explicit guidance on the necessity to consider, on a motion to dismiss, the underlying circumstances and the specific effect on the litigation. The action of the trial court, clearly in violation of long-standing precedent, should be reversed.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 83-6289
DC No. CV 82-310-WPG
(Central California)

CA No. 83-6527
DC No. CV 82-0310-RG

ORDER

RAMAN P. PATEL,

Plaintiff-Appellant,

vs.

FLYING TIGER LINE, INC.,

Defendant-Appellee.

Before: BARNES, FARRIS, and CANBY,

Circuit Judges.

Appellant's petition for rehearing is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CA No. 83-6289
DC No. CV 82-310-WPG

CA No. 83-6528
DC No. CV 82-0310-RG

MEMORANDUM*

RAMAN P. PATEL,

Plaintiff-Appellant,

vs.

FLYING TIGER LINE, INC., a corporation,

Defendant-Appellee.

Appeal from
the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding
Richard A. Gadbois, Jr., District Judge, Presiding
Submitted January 28, 1985

Before: BARNES, FARRIS, and CANBY,

Circuit Judges.

The panel unanimously agrees that this case may be submitted without oral argument.

Raman Patel appeals the district court's order dismissing his employment discrimination claim with prejudice and imposing sanctions of $500 for his failure to comply with discovery rules and a court order. Patel also appeals the denial of his motion for a new trial or for relief from judgment. He contends

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit.

that the sanctions were imposed solely for punishment and without consideration of Patel's ability to comply with discovery, and that the sanctions were unrelated to the issues in discovery. We affirm the district court's order.

The district court's Fed. R. Civ. P. 37 order is reviewed for an abuse of discretion. Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983). Unless there is a firm and definite conviction that the trial court committed a clear error of judgment, a Rule 37 dismissal should be affirmed. Id. The trial court's imposition of Rule 37 sanctions must be both just and specifically related to the discovery claim at issue. Wyle v. R.J. Reynolds, 709 F.2d at 591.

These requirements are met. Patel's case was dismissed after fourteen months

of delays and numerous failures to comply with discovery. Patel disregarded discovery requests, ignored court filing deadlines, failed to request continuances, and failed to appear at a hearing. Moreover, the court specifically warned Patel that continued disregard of his obligations would result in dismissal of his suit. The court's dismissal of the suit was warranted as a means of deterring Patel and other litigants from such discovery breaches. See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam); R.J. Reynolds, 709 F.2d at 589.

Further, the dismissal order was related to the claims at issue in discovery. By initiating the suit, Patel put various claims in issue, but information relevant to those claims was not provided in timely fashion. This preju-

diced Flying Tiger's ability to defend the lawsuit and impermissibly increased its legal expenses in obtaining the information. See Wyle v. R.J. Reynolds, 709 F.2d at 591; G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978). Although Patel made a last-minute tender of some information, that effort did nothing to cure the problems created by his earlier failures to comply with discovery. See G-K Properties, 577 F.2d at 647. There was no error in the imposition of the sanction for Patel's failure to provide discovery on material issues.

Patel's repeated failure to comply with discovery requests and court rules did not result from circumstances beyond his control. Although his job may have taken Patel out of the country for extended periods of time, he was not

prevented from contacting his counsel periodically. Patel's contention that a hurricane prevented his attorney from complying with discovery and court rules is without merit. That hurricane struck two months after discovery responses were due and a month after the motion to dismiss was filed. Patel's failures evidenced his own wilfulness, bad faith, or fault, and the sanction was therefore appropriate. See Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981). Moreover, because Patel's repeated failures to comply with discovery were wilful and inexcusable, the trial court did not abuse its discretion by awarding Flying Tiger $500 to cover the cost of the attorney fees in preparing the motion to dismiss. See United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365, 1370-71 (9th Cir. 1980).

We find no error in the district court's denial of Patel's motion for new trial. None of the arguments presented in the motion warranted reassessment by the district court of its decision. As noted above, the plaintiff's belated, incomplete tender of information does not save him from sanctions. The scheduling and weather problems that prevented plaintiff's counsel from responding to the motion to dismiss should have been raised before the hearing date in a motion to continue, not in a motion for new trial. The district court also properly denied Patel's Rule 60 (b) motion. Smith v. Lujan, 588 F.2d 1304, 1307 (9th Cir. 1979).

Affirmed.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMAN P. PATEL,	)No.CV 82 0310 RG
	)
Plaintiff,	) (PROPOSED)
	) ORDER DISMISSING
v.	) COMPLAINT AND
	) GRANTING SANC-
FLYING TIGER LINE, INC.)	TIONS, AND JUDG-
a Corporation,	) MENT
	)
Defendant.	)
	)

This matter came on regularly for hearing on August 22, 1983, before The Honorable Richard A. Gadbois, Jr., District Judge, presiding, defendant, The Flying Tiger Line Inc. ("Flying Tiger"), having moved pursuant to Rule 37 of the Federal Rules of Civil Procedure for an

order dismissing the complaint and for other sanctions because of plaintiff's failure to answer interrogatories and requests for production of documents in violation of discovery rules and the Court's previous discovery order. The Court having considered the pleadings, files and records in this action, the documents and memorandum of points and authorities submitted in connection with said motion and the oral argument on the motion, now finds, as set forth in the Findings of Fact and Conclusions of Law filed herewith, that plaintiff has repeatedly and wilfully failed to answer Flying Tiger's discovery, to comply with the Local Rules of this Court and its previous discovery order, and further finds that Flying Tiger is entitled to dismissal of the complaint and sanctions against plaintiff as a matter of law.

IT IS HEREBY ORDERED that Flying Tiger's motion to dismiss and for sanctions is granted; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that this action be dismissed in its entirety with prejudice and that Flying Tiger be awarded sanctions against plaintiff and his counsel in the amount of $500.00, payable to O'Melveny & Myers, to cover its reasonable attorneys' fees in connection with not only the filing of the instant motion but also its previous motion to dismiss.

DATED _____, 1983.

_____
RICHARD A. GADBOIS, JR.
United States District
Court Judge

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RAMAN P. PATEL, Plaintiff, v. FLYING TIGER LINE, INC., a corporation, Defendant.	No.CV 82 0310 RG (PROPOSED) FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on regularly for hearing on August 22, 1983 before The Honorable Richard A. Gadbois, Jr., District Judge, presiding, defendant, The Flying Tiger Line Inc. ("Flying Tiger"), having moved pursuant to Rule 37 of the Federal Rules of Civil Procedure for an

order dismissing the complaint and for other sanctions because of plaintiff's failure to answer interrogatories and requests for production of documents in violation of both discovery rules and this Court's previous discovery order. The Court has considered the pleadings, files and records in the instant case, the memorandum of points and authorities with supporting declaration and exhibits submitted in support of said motion, and the oral argument presented at the hearing of this motion; and the Court having fully considered the law and the facts disclosed by this record, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, a former second

officer pilot for Flying Tiger, filed this action on or about January 22, 1982, alleging that his failure to pass upgrade training to first officer and his resultant termination by Flying Tiger were discriminatory acts in violation of federal and state civil rights statutes, the California Constitution, and the terms of his collective bargaining agreement.

2. On December 15, 1982, Flying Tiger brought a motion under Rule 37(d) of the Federal Rules of Civil Procedure to dismiss the complaint and for sanctions because of plaintiff's failure to appear at his noticed deposition and to allow its completion, and his failure to respond to Flying Tiger's first set of interrogatories. After a hearing on January 10, 1983, this Court issued a discovery order dated January 26, 1983, denying

Flying Tiger's motion to dismiss and reserving its ruling on the request for sanctions for a later determination based upon plaintiff's future conduct. The order also stated that "[a]ny future failure by plaintiff to comply with discovery rules and/or the Local Rules of the Central District of California shall subject plaintiff to sanctions, including dismissal of the complaint." Finally, this Court ordered: (1) the resumption and completion of plaintiff's deposition and plaintiff to serve responses to Flying Tiger's first set of interrogatories; (2) all discovery to be completed by July 29, 1983; and (3) plaintiff to tender immediately eighty dollars payable to O'Melveny & Myers as reimbursement for a deposition reporter's cancellation fee.

3. Thereafter, Flying Tiger

unsuccessfully attempted to engage in additional discovery. Thus, on February 25, 1983, Flying Tiger served on plaintiff a first request for production of documents identified in plaintiff's deposition and in his responses to its first set of interrogatories. Responses to this request were not received by the March 30, 1983 due date, although plaintiff neither sought nor obtained an extension of time to answer this discovery. Almost a month and one-half after the due date, on May 9, 1983 Flying Tiger's counsel sent a letter to plaintiff's counsel (David T. Lopez, in Houston, Texas and William H. Steiner in Los Angeles, California) requesting production of the documents. This letter also constituted a request to meet to eliminate the necessity for filing any discovery motion pursuant to Rule 3.15.1 of the Local Rules

of the District of California. Plaintiff's counsel did not respond to the May 9, 1983 letter. Later in May, Flying Tiger's counsel telephoned Mr. Lopez in order to resolve this failure to answer discovery. During the conversation, Flying Tiger's counsel was advised that the requested documents would be produced before the end of May. By the date of the filing of the instant motion on July 25, 1983, the documents had not been produced.

4. On May 16, 1983 Flying Tiger served on plaintiff a second set of interrogatories and second request for production of documents. This discovery requested, inter alia, the identification of persons with knowledge of plaintiff's complaint allegations relevant documents, and his expert witnesses, and the

production of identified documents. This discovery request was not answered by the June 20, 1983 response date, and, again, plaintiff neither sought nor obtained an extension of time to answer. Therefore, on July 5, 1983 Flying Tiger's counsel unsuccessfully attempted to reach Mr. Lopez by telephone in order to obtain the requested discovery. Counsel was informed that Mr. Lopez was unavailable to talk on the phone and that he would return the call. However, the call was not returned.

5. On July 8, 1983 Flying Tiger's counsel sent a letter to plaintiff's counsel requesting answers to both Flying Tiger's first request for production of documents and its second set of interrogatories and second request for production of documents, and advising that if

answers were not received in the offices of Flying Tiger's counsel by July 15, 1983, Flying Tiger would file a discovery motion. That letter also contained a request to meet to eliminate the necessity for filing any discovery motion pursuant to Local Rule 3.15.1. A copy of that local rule was enclosed with the letter.

6. On July 15, 1983 Flying Tiger's counsel received a telephone call from Mr. Lopez, who indicated that answers to Flying Tiger's outstanding discovery, including the requested documents, would be delivered to Flying Tiger's counsel's office by July 18, 1983. This conversation was confirmed in a letter dated July 18, 1983, from Flying Tiger's counsel to Mr. Lopez. However, Flying Tiger had not received answers to its outstanding discovery prior to the filing of the instant

motion.

7. On July 25, 1983 Flying Tiger filed the instant motion to dismiss and for sanctions. Plaintiff did not file an opposition memorandum of points and authorities, as required by Local Rule 3.6.1. At the August 22, 1983 hearing on the motion, neither of plaintiff's counsel appeared, as required by Local Rule 3.10. Rather, Flying Tiger's counsel represented to this Court that he had talked to Mr. Lopez on the telephone that morning, and that Mr. Lopez had indicated that he was in trial and could not make the hearing and had been unable to contact Mr. Steiner to have him appear at the hearing. In addition, Flying Tiger's counsel stated that Mr. Lopez had requested a one week continuance of the hearing. This untimely request for a

continuance was denied by this Court.

8. Plaintiff has repeatedly and wilfully failed to answer interrogatories and requests for documents, and to comply with the Local Rules of this Court and its discovery order.

9. Flying Tiger has incurred expenses, including attorneys' fees, by not only the filing of the instant motion but also its previous discovery motion where the question of sanctions was reserved for a later determination.

10. Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

11. Any Conclusion of Law hereinafter recited which should be deemed a

Finding of Fact is found to be true in all respects and is incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Court concludes in all respects as set forth in the foregoing Findings of Fact that said findings have been made upon issues which are determinative in this action.

2. District courts have the discretion to order any of the available sanctions, including dismissal of the complaint, for the failure of a plaintiff to comply with discovery rules and orders. See Fed. R. Civ. P. 37; National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976)(per curiam); Sigliano v. Mendoza, 642 F.2d 309, 310

(9th Cir. 1981); United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 365, 369 (9th Cir. 1980); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647-48 (9th Cir. 1978). This Court concludes that plaintiff has repeatedly and wilfully failed to answer interrogatories and requeests for documents, and has disregarded discovery rules, the Local Rules of this Court, and its discovery order. Accordingly, this Court exercises its discretion to dismiss the complaint. Dismissal is particularly warranted here for two reasons. First, because lesser sanctions were not a deterrent to this plaintiff. Second, because Flying Tiger has been impermissibly prejudiced in its efforts to engage in discovery and to prepare for trial.

3. Plaintiff's failure to comply

with discovery rules, the Local Rules of this Court and its discovery order was not substantially justified, therefore, sanctions in the amount of $500 against plaintiff and his counsel are imposed. See Fed. R. Civ. P. 37(d).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED _____, 1983.

RICHARD A. GADBOIS, JR.
United States District
Court Judge